

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN ARREGUIN,

Defendant and Appellant.

B291184

(Los Angeles County
Super. Ct. No. BA446085)

APPEAL from a judgment of the Superior Court of Los Angeles County, David Herriford, Judge. Affirmed as modified.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, David E. Madeo and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Martin Arreguin appeals from the judgment after a jury convicted him of seven counts arising from the sexual abuse of his niece R.S., a minor. At trial, the prosecution introduced into evidence a report prepared by a nurse who conducted a forensic medical examination of R.S., referred to by the parties as a SART (sexual assault response team) examination. (See *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1463.) The nurse did not testify at trial; instead, the prosecution called a nurse practitioner who worked in the same rape treatment center as the examining nurse and had reviewed the SART report as well as the photographs and video taken during the examination. In her testimony, the nurse practitioner explained the contents of the SART report and offered her own observations and opinions based on her review of the report and the photos and video.

On appeal, Arreguin contends that admission of the SART report without calling the report's author to testify violated his constitutional right to confront the witnesses against him. Arreguin forfeited this challenge by not objecting on this basis below. Moreover, any error was harmless beyond a reasonable doubt; even in the absence of the report, the jury would have heard, and did hear, the key incriminating findings through the admissible testimony of the nurse practitioner, and Arreguin fails to show any other prejudice from the admission of the report or his inability to cross-examine its author.

The parties agree that Arreguin is entitled to three additional days of presentence credit, and we modify the judgment to credit those days. We otherwise affirm.

PROCEDURE

An information filed May 19, 2016 charged Arreguin with two counts of sexual intercourse or sodomy with a child 10 years old or younger (Pen. Code,¹ § 288.7, subd. (a)), three counts of committing a forcible lewd act upon a child under the age of 14 (§ 288, subd. (b)(1)), one count of oral copulation or sexual penetration with a child 10 years old or younger (§ 288.7, subd. (b)), and one count of sexual penetration by a foreign object of a victim under the age of 14 (§ 289, subd. (a)(1)(B)).

The trial court declared a mistrial in Arreguin's first trial because the prosecution had not disclosed certain DNA evidence until opening statements. The trial court declared a mistrial in Arreguin's second trial when the jury deadlocked.

After a third trial, the jury found Arreguin guilty of all counts. The trial court sentenced Arreguin to a determinate term of 34 years and a consecutive indeterminate term of 25 years to life, for a total of 59 years to life. The trial court also imposed fines and fees and awarded credits.

Arreguin timely appealed from the judgment following the third trial.

¹ Further unspecified statutory citations are to the Penal Code.

FACTS

We limit our summary to evidence from the third trial relevant to the issues on appeal.

A. Prosecution evidence

1. R.S.'s sister's testimony

In March 2015, nine-year-old R.S. lived in an apartment with her mother, her 18-year-old brother, her 21-year-old sister V.C., and V.C.'s boyfriend and daughter. Arreguin lived in the apartment below R.S.'s apartment. He was R.S.'s uncle by marriage; his wife was R.S.'s mother's sister.

On March 13, 2015, V.C. was looking after R.S. while their mother was out of town. That evening, V.C. realized R.S. wasn't in the apartment and went to look for her at Arreguin's apartment, where R.S. sometimes went to play. Arreguin's door was locked, which V.C. found unusual because her aunt "always left the door open for us so we could always just go in." V.C. knocked and called her aunt's name but no one answered. V.C. saw Arreguin's car parked nearby.

V.C. looked around the apartment building but could not find R.S. She then returned to Arreguin's apartment and knocked loudly while calling out for Arreguin and her aunt. When again no one answered, V.C. went back upstairs to look for R.S. in her apartment.

Having not found R.S., V.C. went back downstairs and saw Arreguin and R.S. standing in the doorway of Arreguin's apartment. V.C. asked where they had been. Arreguin and R.S. answered simultaneously but each gave a different answer; R.S. said they had been playing tag in back, while Arreguin said they had been watching movies.

V.C. observed that R.S. was “really nervous. She was red from her face and she was sweating from her nose and her chin.” She saw that the zipper of Arreguin’s shorts was not up all the way.

V.C. and R.S. returned to their apartment and V.C. asked what had happened. R.S. began crying and said, “ ‘My uncle touches me sometimes,’ ” pointing to her chest and her vagina. R.S. said Arreguin forced her to watch “nasty movies,” and that “ ‘[i]t really hurts when he tries to put it in.’ ” R.S.’s brother then called the police.

2. R.S.’s testimony

R.S.’s mother refused to allow R.S. to testify during the third trial and “re-live the tragic event that occurred.” The trial court declared R.S. unavailable under Evidence Code section 240, subdivision (a)(5).² In place of live testimony, the prosecution presented R.S.’s March 17, 2015 interview with a forensic interviewer from the Children’s Advocacy Center,³ R.S.’s testimony from the preliminary hearing on August 11, 2015, and R.S.’s testimony from Arreguin’s first trial on October 11, 2016.

² Evidence Code section 240, subdivision (a)(5) provides that a witness is unavailable if he or she is “[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.”

³ The forensic interviewer testified at trial, and the prosecution presented the forensic interview during her testimony.

a. R.S.'s forensic interview

R.S. told the forensic interviewer that Arreguin first sexually abused her towards the end of her second grade year. He called her apartment and told her he had a surprise for her. When she went to his apartment, he took her into the bedroom, pulled down her pants, and pushed her onto the bed. Arreguin kissed her, and tried to put his penis in her vagina, but R.S. tensed up and Arreguin was unable to do so. Arreguin then took her to the dining room and showed her a “movie[] with nasty things,” by which she meant people having sex, on his computer. Arreguin told her if she told anyone what had happened, he would do something bad to her, and he sent her home.

Another time, R.S. went to Arreguin's apartment because he told her he was going to take her out to eat. Arreguin told her to go to the bedroom, where he began kissing her and trying to put his tongue in her mouth. Arreguin was wearing “weird shorts” with a zipper through which he could “take out his thing.” He again unsuccessfully attempted to put his penis in her vagina, which hurt R.S. R.S. saw “milk” come out of Arreguin's penis. Arreguin cleaned up and took R.S. out to eat.

Describing the incident on March 13, 2015, R.S. said Arreguin told her he had a surprise for her, and she went into his apartment. Arreguin's son was sleeping in the living room. Arreguin took R.S. into the dining room and tried to kiss her. He showed her another nasty movie on his computer. Then Arreguin took R.S. into the bathroom and told her to lie on the floor. Arreguin tried to put his penis in her vagina but it only went in “a little bit.” R.S. reported that “his milk came out,” and he told her to go watch cartoons.

R.S. said the incidents of abuse had happened in every room of Arreguin's apartment except the kitchen. She described an incident taking place in Arreguin's living room in which he kissed her and attempted to put his penis in her vagina. She described an incident in the dining room in which Arreguin watched a pornographic movie with her, then tried to duplicate the acts in the movie, including attempting to put his penis in her vagina and her anus while she lay on the table.

R.S. said Arreguin had put his mouth on her exposed chest and vagina. R.S. said Arreguin often made her hold his penis in her hand, threatening to do something bad to her if she did not.

b. R.S.'s preliminary hearing testimony

R.S. testified that Arreguin made her watch "nasty videos" on his computer of people having sex. She described him kissing her on her chest and between her legs, and making her kiss him on the mouth. She described the zippered shorts he wore, which she called "weird pants." She testified that he attempted unsuccessfully on more than one occasion to put his penis in her vagina, which hurt her. She said the first time he did this she was in the second grade. Sometimes "white liquid" came out of his penis. On one occasion he tried to put his penis in her anus. He also sometimes put his finger in her vagina. He put his mouth on her vagina on more than one occasion.

R.S. described the March 13, 2015 incident, stating that Arreguin attempted to put his penis in her vagina, first in his bedroom and then in the bathroom.

c. R.S.'s testimony from the first trial

R.S. testified that Arreguin made her watch videos "showing things that kids are not supposed to see," "[l]ike people

kissing and touching each other.” She described the March 13, 2015 incident, saying Arreguin kissed her and tried to put his penis in her vagina, which he also did on other occasions. She described his zippered shorts, and white liquid coming out of his penis.

R.S. said Arreguin tried to put his penis in her anus “once or twice,” later stating that it happened twice. She said Arreguin once told her to put his penis in her mouth, but she refused. Arreguin put his mouth on her vagina “a few times or two times.” Arreguin put his finger in her vagina more than once.

3. R.S.’s forensic medical examination and report

On March 13, 2015, Nurse Kari Ross examined R.S. at the Santa Monica Rape Treatment Center (Rape Treatment Center). Ross documented her findings on a CalEMA 2-930 form entitled “Forensic Medical Report: Acute (<72 Hours) Child/Adolescent Sexual Abuse Examination.” (Some capitalization omitted.) The prosecution introduced Ross’s report into evidence.

On page two of the report, Ross wrote that R.S. reported multiple incidents of sexual abuse by Arreguin in his apartment over several years. R.S. told Ross she was at the Rape Treatment Center because her uncle had touched her “‘private parts’” and had “‘forced [her] to lay on the bathroom floor [and] took [off] my pants [and he] put his thing in my vagina.’” R.S. reported that Arreguin “‘kisses me on my mouth,’” although she pointed at her cheek when saying this. R.S. also reported her uncle forcing her to watch “‘nasty movies,’” including that day. R.S. said her uncle had told her, “‘[D]on’t tell anybody or I’m gonna make you something [sic] horrible.’” R.S. reported Arreguin had “forced oral copulation ([a]ssail[ant] to [patient]) in the past.”

Page three of the report contained multiple checkboxes to document, among other things, the “acts described by patient.” (Capitalization omitted). Ross checked the boxes for “genital/vaginal contact/penetration” by “penis” and “finger” with “associated pain.” Ross checked the boxes for “oral copulation of genitals . . . of patient by assailant,” “anal/genital fondling” by both patient of assailant and assailant of patient, and “kissing.” (Some capitalization omitted.) Ross checked the boxes indicating that Arreguin used “force” and “threats.” (Some capitalization omitted.) Ross also checked boxes indicating Arreguin had showed R.S. videotapes; Ross wrote in “‘sexual movies’” and “‘nasty tapes.’” Ross did not check boxes indicating any anal contact or penetration, instead checking the “no” boxes. Under “Other symptoms disclosed,” Ross indicated that R.S. had reported stomach pain for the past three months.

On pages four through seven, Ross documented the results of her physical examination of R.S. Page six contained a pre-printed diagram of female genitalia on which Ross indicated the location of five abrasions or bruises. On page seven, Ross indicated no findings from an anal and rectal examination.

On page eight, under “Findings and Interpretation” (some capitalization omitted), Ross checked the boxes for “Abnormal anal-genital exam,” “Consistent with history,” and “Sexual abuse is highly suspected.” She also wrote in, “[O]f note[]-prob healed transection of hymenal tissue at 6:00.” Ross documented the swab samples she took from R.S. and indicated that she photographed R.S.’s genital area with a high definition digital camera. Ross signed the report, as did the police officer who received the evidence from her.

4. Trial testimony regarding R.S.'s forensic medical examination

At trial, the prosecution called as a witness Sally Wilson, a nurse practitioner and clinical coordinator at the Rape Treatment Center. In addition to performing medical forensic examinations on patients reporting sexual abuse or sexual assaults, Wilson's duties as coordinator included reviewing the written and video documentation of forensic examinations performed by other nurses. Wilson was the custodian of records for the Rape Treatment Center.

Wilson testified that she did not perform the exam on R.S., but reviewed Ross's written report of the examination within days of when it was prepared, and had reviewed the photographs and video taken of the exam before coming to testify in court.

Wilson explained what a forensic examination of a prepubescent child entails, noting that the examiner would use different techniques than he or she would with an adult. The prosecution asked if those different techniques were used when Ross examined R.S., and Wilson said yes. Defense counsel objected on the basis of hearsay and lack of foundation. The trial court confirmed with Wilson that her testimony was based on her review of Ross's report and procedures, and overruled the objection.

Wilson testified that Ross documented in her report that R.S. had acute injuries, specifically "abrasions and bruises around her genital area . . . and some bruising on her hymen." Ross also noted a "big notch" in R.S.'s hymen that Ross "suspected had healed from a previous incident." Wilson stated that in preparation for her testimony she reviewed the video record of Ross's examination and concurred there "was a

significant break in the tissue” of R.S.’s hymen. Wilson referred to the healed injury as a “laceration” which may have been caused by blunt force trauma. Wilson also testified about Ross’s findings regarding the locations of the multiple acute injuries.

Wilson testified that R.S. returned to the Rape Treatment Center for a follow-up visit. Wilson did not examine R.S. during that visit but reviewed the documentation from it. Wilson stated that at the follow-up visit R.S.’s acute injuries were all gone, but the healed injury to the hymen remained. Wilson testified the healed injury likely would not change in appearance until R.S. reached puberty.

Asked if “upon your review of the records and the video[]graphic evidence,” Wilson agreed with what Ross recorded regarding the injuries, Wilson said, “Yes, I do.”

Defense counsel then objected that Ross’s report was “hearsay and I would object to counsel displaying these records to the jury, because they will not be able to see the writing of the notes that was made by the actual nurse practitioner who did the exam. And I think that is hearsay because [s]he’s not here to testify and I would object. Lacks foundation.” The trial court ruled that the prosecution had laid the foundation for the report to be admitted as a business record. “In addition to that, this witness actually reviewed portions of the exam. So the objection is overruled.”

The prosecution displayed to the jury the genital diagram from page six of Ross’s report. Wilson explained that each injury was noted on the diagram using a numbering system.

Wilson testified that Ross in her report had documented R.S.’s answers to Ross’s questions about R.S.’s medical history and why she was at the Rape Treatment Center. The prosecution

asked Wilson what, according to the report, R.S. had said. Defense counsel said, “Same objection,” which the trial court overruled. Wilson testified that R.S. had reported her uncle touching her on her “private parts” and putting his “thing” in her vagina, kissing her, and forcing her to watch “nasty movies.” Wilson stated, “The patient also reports the assailant has forced oral copulation, which is putting her mouth onto his penis.”⁴ Wilson testified that, according to Ross’s report, R.S. reported sexual acts occurring over several years, and that she complained of pain in her genital area and said she had been having stomach pain for about three months.

Wilson described the procedures for collecting physical evidence during a forensic exam, and explained what swabs were taken from R.S. and how they were given to the police.

Wilson testified that the healed laceration on R.S.’s hymen was evidence that the hymen had been touched, and that “the tissue would have to have been stretched and split in that area,” which would be painful for the child.

The prosecution asked, “[A]s a result of looking at all of the videographic evidence and your review of [Ross’s report], did you find that the injuries that you now discussed here in court are consistent with child sexual abuse?” Wilson responded, “They are consistent with what the patient reported which was the penile-vaginal penetration and penetration of her vagina with a finger as well.” The trial court overruled defense counsel’s objection to the phrase “‘consistent with penetration with a finger as well.’”

⁴ Ross’s report actually stated that the reported oral copulation was “[a]ssail[ant] to [patient].”

Wilson testified that R.S. did not report to Ross that her uncle had touched her anal area or buttocks.

On cross-examination, Wilson testified that it was unlikely the laceration on R.S.'s hymen was caused accidentally because the area was protected by the outer layers of the genitals. Asked if the injury could "have been caused by something other than sexual intercourse," Wilson replied, "I cannot think of anything that would have caused it. What I can tell you is it would have to be a penetrating injury," "something hitting up against that tissue to cause it enough to split."

5. Other physical evidence

A DNA profile taken from a swab of Arreguin's scrotum was consistent with R.S.'s DNA profile.

B. Defense evidence

Arreguin did not testify at trial. He called as an expert a professor of psychology who testified regarding "children suggestibility and forensic interviewing."

DISCUSSION

I. Arreguin Forfeited His Confrontation Clause Challenge, And Any Error Was Harmless Beyond A Reasonable Doubt

Arreguin contends that admission of Ross's SART report into evidence without her testifying as a witness violated his right under the Sixth Amendment of the United States Constitution to confront the witnesses against him. We review constitutional challenges to the admission of evidence de novo. (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

The confrontation clause of the Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (U.S. Const., 6th Amend.) The confrontation clause prohibits “admission of testimonial hearsay against a criminal defendant . . . unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing.” (*People v. Sanchez* (2016) 63 Cal.4th 665, 680 (*Sanchez*), citing *Crawford v. Washington* (2004) 541 U.S. 36, 62, 68 (*Crawford*).)

Hearsay, as is well known, is an out-of-court statement “offered to prove the truth of the facts it asserts.” (*Sanchez, supra*, 63 Cal.4th at p. 680.) As for what constitutes “testimonial” hearsay, the U.S. Supreme Court “has offered various formulations . . . but has yet to provide a definition of that term of art upon which a majority of justices agree.” (*Id.* at p. 687.) Because, as discussed *post*, we resolve this appeal on the basis of forfeiture and harmless error, we may assume for purposes of argument that Ross’s report constituted testimonial hearsay without settling on a definition.

A. Arreguin forfeited his confrontation clause challenge by not objecting on that basis in the trial court

Arreguin’s counsel failed to object to Ross’s report and Wilson’s testimony on confrontation clause grounds, and thus did not preserve the issue for appeal. (*People v. Redd* (2010) 48 Cal.4th 691, 730.) Counsel’s objections based on hearsay and lack of foundation were insufficient to preserve a separate confrontation clause challenge, which presents different legal

issues. (*Id.* at p. 731, fn. 19; *People v. Rangel* (2016) 62 Cal.4th 1192, 1217 [*Crawford* confrontation clause objection “invokes different legal standards than . . . a hearsay objection”].)

B. Any error in admitting Ross’s report was harmless beyond a reasonable doubt

Even had Arreguin preserved his challenge, we would not reverse his conviction “because any federal constitutional error arising from the admission of [Ross’s report] was harmless beyond a reasonable doubt.” (*People v. Perez* (2018) 4 Cal.5th 421, 456 (*Perez*) [applying harmless error analysis to *Crawford* confrontation clause challenge], citing *Chapman v. California* (1967) 386 U.S. 18, 24.) The contents of Ross’s report either were cumulative of other properly admitted evidence or were not prejudicial to Arreguin; thus, the report’s exclusion would not have affected the jury’s verdict.

The most significant evidence provided by Ross’s report were the findings of physical injury to R.S.’s genitals, which Ross concluded were consistent with the sexual abuse R.S. reported to Ross. The jury received this information not only from Ross’s report, however, but also from Wilson’s testimony. There, Wilson stated her own observations and conclusions based on her review of Ross’s report and the video and photographs of the examination. As made clear by our Supreme Court in *People v. Garton* (2018) 4 Cal.5th 485 (*Garton*), those observations and conclusions did not implicate the confrontation clause.

Garton concerned the testimony of Dr. Susan Comfort, a coroner, at a murder trial. (*Garton, supra*, 4 Cal.5th at p. 504.) Comfort had not participated in the victim’s autopsy, which was performed by her retired predecessor, Dr. Harold Harrison.

(*Ibid.*) Comfort testified that in forming her opinions she relied on the “autopsy report and associated diagrams, as well as photographs taken at the autopsy and the crime scene,” and “an emergency medical technician’s crime scene report and a ballistics report produced by an employee of the California Department of Justice.” (*Ibid.*) The autopsy report itself was not introduced into evidence. (*Ibid.*)

Comfort “testified on the trajectories of the bullets that injured [the victim] and her fetus, observed that the fetus was approximately eight and a half months old and would have been viable, and concluded that gunshot wounds caused [the victim’s] death.” (*Garton, supra*, 4 Cal.5th at p. 504.) Comfort further testified that the victim would have died within 20 or 30 minutes after being shot. (*Ibid.*) On appeal, the defendant claimed that Comfort’s testimony violated the confrontation clause by “introduc[ing] out-of-court statements from the autopsy report to the jury.” (*Id.* at p. 505.)

The Supreme Court separated Comfort’s testimony into three categories: “(1) in-court statements and opinions premised explicitly on photographs and X-rays from the autopsy . . . ; (2) recitations of statements made by Harrison in the autopsy report; and (3) opinions relying generally on Harrison’s autopsy report and photographs, but not identifying specific facts from Harrison’s report or photographs.” (*Garton, supra*, 4 Cal.5th at p. 505.) As an example of the third category of testimony, the Supreme Court referred to Comfort’s opinion that the cause of death was multiple gunshot wounds; she explained that she reached this opinion “[a]fter reviewing the autopsy report prepared by Dr. Harrison and also the photographs that were taken at the scene and at the autopsy.” (*Ibid.*)

The Supreme Court held that the first category of testimony did not implicate the confrontation clause, because photographs are not hearsay: “‘Only people can make hearsay statements; machines cannot.’” (*Garton, supra*, 4 Cal.5th at p. 506.) Thus, “‘the admission of autopsy *photographs*, and competent testimony based on such photographs, does not violate the confrontation clause.’” (*Ibid.*)

The court held that the second category of testimony, in which Comfort recited facts from the autopsy report of which she had no personal knowledge, did constitute hearsay. (*Garton, supra*, 4 Cal.5th at p. 506; see *Sanchez, supra*, 63 Cal.4th at p. 684 [“If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay”].) The court did not decide whether the hearsay was testimonial under *Crawford*, instead concluding that its admission was harmless, given its relative brevity and the fact that “the state of [the victim’s] body and the manner in which she died were not disputed at trial.” (*Garton*, at p. 507.)

As for the third category of testimony, in which Comfort offered opinions “generally relying on the autopsy report,” the Supreme Court stated that “an expert may rely on hearsay in forming an opinion and may tell the jury in general terms that she did so.” (*Garton, supra*, 4 Cal.5th at p. 506, citing *Sanchez, supra*, 63 Cal.4th at p. 685.) The court continued: “If Comfort had related as true a statement by Harrison, then she would have communicated hearsay. But this category of Comfort’s testimony did not directly convey any statements by Harrison, nor in context did her testimony implicitly do so. Comfort explained earlier in her testimony that in addition to Harrison’s

autopsy report, she reviewed Harrison's diagrams and all of the photographs, and that 'based on [her] review of all those documents,' she 'reach[ed] the same conclusions in [her] mind' as Harrison. In light of her entire testimony, it is clear that Comfort was exercising her own independent judgment to arrive at her conclusions. In sum, this third category of Comfort's statements only conveyed to the jury in general terms that Comfort relied on the autopsy report and did not communicate hearsay to the jury." (*Garton*, at pp. 506–507.)

Like the testifying coroner in *Garton*, Wilson, in addition to conveying specific statements from Ross's report to the jury, stated her own opinions and observations based on her review of Ross's report and the video and photographs Ross took. Asked if she herself reviewed the video record and concurred that R.S. had a healed laceration on her hymen, Wilson answered in the affirmative. She then offered her own opinion, not present in Ross's report, that the wound would have been caused by a penetrating injury, that it would have been painful, and that it was unlikely to have occurred accidentally. She also concurred with the other findings of injury, again based upon "review of the records and the video[]graphic evidence." Asked if, based on her review of the video and Ross's report, she concluded that R.S.'s injuries were "consistent with child sexual abuse," Wilson said, "They are consistent with what the patient reported which was the penile-vaginal penetration and penetration of her vagina with a finger as well." As in *Garton*, "it is clear that [Wilson] was exercising her own independent judgment to arrive at her conclusions," and was not simply parroting Ross's report. (*Garton*, *supra*, 4 Cal.5th at p. 507.)

Thus, apart from Ross's report itself, the jury heard expert testimony from Wilson, based on her review of photos, video, and Ross's report, that R.S. had suffered injuries to her genital area consistent with penetration by a penis or finger. Under *Garton*, that testimony did not implicate the confrontation clause. The jury would have heard the testimony even if the trial court had excluded Ross's report and prohibited Wilson from testifying to its specific contents. The report itself added no significant information regarding the injuries that the jury did not properly hear from Wilson. Therefore, to the extent the trial court erred in admitting the report's evidence of physical injury, the error was harmless.

Aside from the findings of physical injury, Arreguin does not identify any other information from Ross's report he contends was prejudicial, nor from our own review have we identified any. The only other incriminating evidence of significance was Ross's documentation of the acts of sexual abuse reported by R.S. Arreguin does not contend that admission of this information was prejudicial. Nor could he, because the information was cumulative of, and far less detailed than, R.S.'s testimony from the preliminary hearing, Arreguin's first trial, and R.S.'s forensic interview, all of which would have had a greater impact on the jury's determination than the limited and duplicative information in Ross's report.

Arreguin argues that Ross's absence from trial denied him the opportunity to question her findings. This is necessarily the case whenever an expert testifies in reliance on a report or information provided by a non-testifying witness, yet our Supreme Court repeatedly has upheld such expert testimony against confrontation clause challenges. (See *Sanchez, supra*,

63 Cal.4th at p. 685; *Perez, supra*, 4 Cal.5th at p. 457; *Garton, supra*, 4 Cal.5th at p. 506.) Again, Ross’s report contained no significant information that the jury did not otherwise hear from Wilson or other sources that Arreguin did have the opportunity to cross-examine. Thus, his inability to cross-examine Ross directly did not prejudice him.

Arreguin contends Ross’s report raised issues that he was unable to address given Wilson’s lack of first-hand knowledge, namely if or when Ross spoke with police officers during the exam, whether Ross used a “Woods lamp” during the exam, and whether R.S. reported to Ross that Arreguin ejaculated or touched her anal area. Arreguin does not explain, nor do we discern, how his inability to question Ross on these topics prejudiced him.

Finally, Arreguin objects that “the reason that Kari Ross was not called was never disclosed to the defense on the record,” and argues that the reason for Ross’s absence might have impacted her credibility. This is mere speculation, especially given that Arreguin’s counsel had the opportunity to ask the reason for Ross’s absence, yet Arreguin cites nothing in the record indicating his counsel did so. Moreover, any challenge to Ross’s credibility would have had little impact on the verdict given Wilson’s clearly admissible testimony, based on her independent review of the evidence, that R.S. suffered injuries to her genitals consistent with sexual penetration.

Our conclusion that admission of the report was harmless, and that the jury would have convicted Arreguin even had the report been excluded, is bolstered not only by Wilson’s admissible expert testimony regarding R.S.’s physical injuries, but also by other evidence of Arreguin’s guilt. This included DNA consistent

with R.S.'s DNA found on Arreguin's scrotum, V.C.'s testimony of Arreguin's and R.S.'s behavior when she found them together on March 13, 2015, and R.S.'s statements and testimony on multiple occasions that Arreguin repeatedly sexually abused her.⁵ Given this evidence, any error in admitting Ross's report did not affect the jury's verdict.

II. Arreguin Is Entitled To Three Additional Days Of Presentence Custody Credits

Arreguin was in presentence custody for 1,208 days, having been arrested on March 13, 2015 and sentenced on July 2, 2018. At sentencing, however, the trial court awarded Arreguin only 1,206 days of actual custody credit, plus 15 percent of that amount, or 180 days, in conduct credit. We presume the award of conduct credit was pursuant to section 2933.1, subdivision (c), which provides that "the maximum credit that may be earned . . . shall not exceed 15 percent of the actual period of confinement."

⁵ In his appellate briefing, Arreguin purports to list examples of inconsistent statements by R.S., including whether on various occasions Arreguin's wife or son was elsewhere in the apartment when Arreguin abused her, where in Arreguin's apartment certain incidents of abuse took place, whether on particular occasions Arreguin ejaculated, and how often Arreguin attempted to anally penetrate her. Regardless of whether R.S. consistently conveyed the details of each incident, she consistently conveyed the core information that Arreguin repeatedly sexually abused her in his apartment, and consistently described the same types of acts constituting that abuse.

The parties agree Arreguin is entitled to two additional days of actual custody credit, which in turn increases his conduct credit by one day, for a total of three additional days of presentence credit. We modify the judgment accordingly.

DISPOSITION

The judgment is modified by awarding two additional days of actual custody credit, for a total of 1,208 days, and one additional day of conduct credit, for a total of 181 days, thus increasing the total award of presentence credit to 1,389 days. The judgment is otherwise affirmed. The trial court shall forward the modified abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.